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SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 16.

METROPOLITAN RAILROAD COMPANY, Appellant
and Plaintiff in Error,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and JOHN BIDDLE, Commissioners of the District of Columbia,

Appellees and Defendants in Error.

BRIEF AND ARGUMENT FOR APPELLANT AND PLAINTIFF IN ERROR.

Appeal from the Supreme Court of the District of Columbia.

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METROPOLITAN RAILROAD COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

Brief and Argument for Appellees and Defendants in Error.

STATEMENT OF THE CASE.

The Metropolitan Railroad Company was incorporated by an act of Congress of July 1, 1864 (13 Stats., 326).

Section 2 of this act provided—

"*That said road shall be deemed real estate.*"

Section 5 thereof enacted:

"That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or other-

wise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such grade and pavement."

"SEC. 6. *And be it further enacted*, That this act *may* at any time *be altered, amended*, or *repealed* by the Congress of the United States."

Section 17 provided that unless the corporation should make and complete one portion of their route within four months and other portions of their route within one year after the company shall have been organized the act should be null and void (13 Stats. at Large, 326).

This charter was altered and amended by act of March 3, 1865 (13 Stats., 536).

The latter act changed the route of the railway in some respects. It extended the line from D and Four-and-a-half streets, along Four-and-a-half street, to the Arsenal grounds, and made other changes not necessary to be noted, and extended the time for the completion of the road (13 Stats. at Large, 536).

By act of July 13, 1868, the Connecticut Avenue and Park Railway Company was incorporated, with authority to construct and operate along the west side of Seventeenth street to its intersection with Connecticut avenue; thence along said avenue to Boundary street (now Florida avenue), and also from the intersection of Boundary street and Connecticut avenue, along the county road from such intersection; thence on any road opened or which may hereafter be opened west of Fourteenth Street road, etc.

Section 2 of this act also provided "*that said road shall be deemed real estate;*" and it contains substantially the same provision as in the act above noted in respect of the alteration of grade and improving streets.

Section 6 of this act also provided that it "may at any time be altered, amended, or repealed by the Congress of the United States."

Section 18 of the act provided that that portion of the road beyond Boundary street should be completed within four years to its proposed terminus in the county of Washington (15 Stats. at Large, 85).

We understand that the Connecticut Avenue and Park Railway Company embraced a part of the route occupied by the plaintiff in error and was absorbed by it.

There was also another company, known as the Boundary and Silver Spring Railway Company, incorporated January 19, 1872, by the Legislative Assembly of the District of Columbia, which has been also apparently absorbed by the plaintiff in error, and by sections 3 and 4 of that act it was provided:

"SEC. 3 *And be it further enacted*, That nothing in this act shall prevent the proper authorities from altering the grade or otherwise improving said highway, and in such event it shall be the duty of said company to change their said railway so as to conform to such grade; and if at any time such grade shall be changed for the benefit of said railway company any expenses that may be incurred by property-holders affected by such change of grade shall be borne by the said railway company.

"SEC. 4. *And be it further enacted*, That this act may at any time be altered, amended, or repealed by the Legislative Assembly of the District of Columbia, or by the Congress of the United States."

By section 12 of the act approved May 18, 1872, Congress provided "that the Washington and Georgetown Railway Company and the *Metropolitan Railroad Company* be, and they are hereby required to remove their tracks, respectively, from the Capitol grounds, as hereby established, and to run the same as they may be directed, from time to time, by the officers in charge of the public buildings and grounds, as the grading and filling up of said grounds may render necessary" (17 Stats. at Large, 84).

By act of March 3, 1875, Congress provided "that the Washington and Georgetown and the Metropolitan Railway Companies, are directed to take up such portions of their tracks as may come in the way of the improvements of the Capitol grounds, and relay the same as may be directed by the officers in charge of improvements of the Capitol grounds" (18 Stats. at Large, 385).

By section 3 of the act of August 6, 1900, it was provided that if any "company operating a line or lines of street railroad from Georgetown or West Washington to or beyond the Capitol grounds shall fail to substitute for horse-power the power herein provided for (electricity) on all its lines within two years from the date of this act, such company shall forfeit its corporate franchises" (26 Stats. at Large, 310–311).

By act of July 28, 1892 (27 Stats., 290), Congress *required* the Metropolitan Railroad Company to repair the bridge across Rock creek at P street at a cost not exceeding $15,000.

Again, Congress by act of August 2, 1894, section 2 (28 Stats., 217), *required* the Metropolitan Railroad Company to equip and operate the lines of its cars with an underground electric system for the propulsion of such cars, "provided

there shall be completed an *extension* thereof," named in the act. And Congress also declared that "in default of such completions all acts or parts of acts chartering or extending the said road are hereby repealed."

By section 4 of the same act, Congress gave jurisdiction to the Court of Appeals of the District of Columbia to hear and determine the merits of the controversy which had resulted unfavorably to the District of Columbia on a plea of the statute of limitations interposed by the Metropolitan Railroad Company (132 U. S., 1), and "Provided, that unless said company shall file in said Court of Appeals its consent in writing to the aforesaid transfer of the said case, and also a waiver of all its rights and defenses under the statute of limitation and for want of notice as herein provided for, and also a waiver of all rights, benefits, advantages and defenses that it has or may have by reason of the decision and judgment of the Supreme Court of the United States made and entered in said case within thirty days after the approval of this act, then all rights granted to said company by this act shall cease and be determined: *Provided*, That the judgment of the said Court of Appeals shall be final and that there shall be no appeal therefrom: *And provided further*, That the cost of said transfer and of the hearing of said case in the Court of Appeals shall be paid by said railroad company."

By section 3 of the act of February 26, 1895 (28 Stats., 682), the Metropolitan Railroad Company was *required to lay down and continue* its underground electric construction of single track from the intersection of P and Thirty-fifth streets, northwest, thence running west along P street to Thirty-sixth street, etc."

This legislation shows that the previous construction of the charter of this railroad company by Congress and the company was that Congress possessed power over this company in the fullest measure. This company before June 6, 1900, was twice *required* to substitute electricity for horse-power in the operation of its cars; it was *required* to repair the P Street bridge at its cost; it was *required* in 1872 to remove its tracks from the Capitol grounds and to run the same as directed from time to time; it was *required* to make extensions of its lines in 1894, in 1895, and again in 1897 by act approved February 27, 1897 (29 Stats., 600); to make an *extension* to the terminus of its line along Columbia road to a point on the west line of Eighteenth street extended. It was from the latter point that the railroad company was required to extend its route by the act of June 6, 1900 (31 Statutes at Large, 668), now under consideration.

The history of the legislation respecting this company previous to June 6, 1900, can be found in the case of District of Columbia *vs.* The Metropolitan Railroad Company, 8 App. Cases D. C., 322, and laws relating to street railway franchises in the District of Columbia (1896), pp. 122 to 145, inclusive.

It is submitted that the course of legislation as shown by the acts of Congress above recited indicates a legislative interpretation acquiesced in by the railroad companies of the power and right of Congress to alter and extend the route of the appellant, under powers reserved in its charter and the amendments thereto. Such was the condition of legislation when, by the act of June 6, 1900, Congress required the appellant to further extend its lines. This act is entitled "An act authorizing and requiring the Metropolitan Rail-

road Company to extend itslines on old Sixteenth street" (31 Stats. at Large, 668). The provisions of this act are set out in appendix to this brief, which contains the opinion of Mr. Justice Hagner.

The first section of the act is addressed to the subject-matter of this extension, and requires the appellant "to extend by double tracks the lines of its underground electric railroad from its present terminus at Eighteenth street and Columbia road, eastwardly along Columbia road to the present Sixteenth northwest, thence north along Sixteenth street to Park street."

In order to provide this route in part at least, Columbia road is widened to a width of one hundred feet and Sixteenth street to a width of eighty-five feet from Columbia road to Park street. In order to acquire the land necessary to make this addition to the road and streets mentioned provision is made for the condemnation of the adjoining and abutting property, and section 2, after providing that a proceeding *in rem* shall be instituted to condemn the land, further provides "that the said Commissioners are authorized and empowered to locate the lines of the railroad of said company within the area so to be acquired as aforesaid."

Section 3 is addressed to the time when the railroad company shall *complete and put in operation* the extension of its lines, and that time is fixed as "within one year from the date of the widening of the said highways as herein provided, and (it is further provided) the said company shall deposit with the collector of taxes of the District of Columbia such sums as are necessary to pay the cost of the inspection of said work."

Section 4 provides "that of the amount found to be due

and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street, as herein provided, such proportional amounts thereof as a jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest, along those portions of said street that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited."

It is supposed that this section in effect provides for the personal assessment against the railroad company, but it will be noted that the previous acts of Congress expressly state that the company's property shall be deemed real estate, and therefore we submit that the extended line acquired by the company by virtue of these charters became its real estate, and that the assessments could be collected as special assessments against this new line of the company; or, if the company failed to make the extension as required, Congress might, by subsequent legislation, forfeit the charter of the company if it deemed such course to be necessary. Proceedings were accordingly instituted on the 12th of July, 1900, for judicial condemnation of the land to be acquired and for the ascertainment respecting what benefits should be assessed against the several properties of the parties interested. We do not understand that any exception is taken to the

method of procedure, or that there is any claim but that every party interested was given an opportunity to be heard and had actual notice of the proceedings. The answer of the railroad company (Record, p. —) asserts that the appellant "is not the owner of any real estate or other property whatsoever, either abutting upon or adjacent to either Columbia road or Sixteenth street along the portions of said road and street which are proposed to be widened." * * * "This respondent is advised and believes, and therefore avers that the said act of Congress of June 6, 1900, is unconstitutional, illegal, and void, in so far as it seeks to compel this respondent to extend its lines over the territory in question, and then to condemn land for public uses along the said extension, which this respondent is thus required to make, and to compel it to pay therefor under the guise or on the ground of speculative benefits to it from the said compulsory extension of its lines, and in the absence of any property owned by it which could be benefited by the said contemplated condemnation proceedings."

It is admitted in its answer that "the former management" * * * "requested permission, at a previous session of Congress, to extend its lines over said Columbia road and Sixteenth street."

There is no provision in the act of June 6, 1900, which required the court to grant any instructions to the jury, but power was reserved to the court "to hear and determine any objections which may be filed to the verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable" (sec. 8) (Record, bottom of page 29).

The plaintiff in error, however, by its counsel, filed ob-

jections to the assessment against it (Record, page 10) which embodied the instructions prayed of the court to jury on its behalf and rejected by the court.

There were five instructions thus asked:

1*a*. The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth street and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of the other owners which it may find will be so benefited.

Refused, and exception by Darlington.

1*b*. The jury is instructed that under the evidence in this case it can make no assessment of benefits against the Metropolitan Railroad Company.

Refused, and exception by Darlington.

2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress approved June 6, 1900.

Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages

and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

4. In determining the question whether or not said railroad company will be benefited by the said extension and the extent of such benefit, if any, the jury shall consider the cost to which said company well be put in extending its lines from its present terminus, as provided in the act of June 6, 1900, and the increased cost of operating its said lines, as shown by the testimony, in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it.

Granted, and exception by D. C. and also G. F. Williams on behalf of certain property-owners.

Instruction 1*a*, which was refused, conceded the right to assess benefits against "such property of the company, if any, as it shall find shall be benefited by the proposed widening and extension of Sixteenth street, and Columbia road," but that instruction and instruction 1*b* also asserted that "no assessment of benefits against the Metropolitan Railroad Company" as such could be made.

Instructions Nos. 2 and 3 seem to us to be the reverse of the propositions contained in the other instructions, and appear to be a waiver of the contention made by the latter. The jury was thereby, at the instance of the railroad company, advised and instructed "that it can assess (such) benefits (only) against the Metropolitan Railroad Company" and "that it is not required to assess any part of the amount of damages which it shall award for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company."

These granted instructions were in harmony with section 4 of the act of June 6, 1900 (Record, page 28).

We fail to see that the act of Congress in terms required the jury to assess benefits against the plaintiff in error as a company or a person, and the court did not so instruct the jury, but it did instruct the jury in effect that it might assess benefits against the property of the company.

The jury by their verdict and award of damages in respect to the land condemned found the amount to be $181,858, and the benefits to be $90,929 and $25,000. The jury also found that the appellant company "will be benefited by the aforesaid widening of Columbia road and the present Sixteenth street," etc., "in the sum of $25,000."

To this return, finding, assessment, and award the appellant company excepted on the ground, first, that the same was without evidence to support it; second, that it was contrary to evidence; third, that it was contrary to the weight of evidence; and, fourth, for errors of law in the instructions given and refused before the said finding, assessment, and award were made.

ARGUMENT.

We are advised that error will be assigned by the appellant for the causes following, viz:

1st. The refusal of the trial court to set aside the assessment because, as it is asserted, it was unsupported by, contrary to, and against the weight of the evidence.

2d. The refusal of the trial court to instruct the jury that no assessment could be made against it as a corporation, but only against its property, if any, that might be benefited.

3d. The refusal of the trial court to instruct the jury that no assessment of benefits could be made against the appellant.

4th. In holding that Congress had power without the assent of appellant to require it to extend its road.

The whole of the testimony submitted to the jury of condemnation is not contained in the record, and therefore error will not be presumed. The absence of the testimony so produced makes it impossible to contend that the finding of the jury was either unsupported by, against, or contrary to the evidence before them, or its weight.

The evidence taken by the jury is only partly produced, while, on the other hand, if reliance is placed on the testimony of Mr. Lackey, the jury may have disbelieved his statements. And in support of the judgment of two courts on the verdict of such jury, if necessary, it is submitted, this

court will presume accordingly. At least error is not presumed, but must be shown.

By stating that the evidence before the jury is only partly produced in this record, we do not mean the absence of the "view" of the jury and its necessary effect, but that and the testimony of many witnesses respecting the boundary parcels along the whole length and on each side of this street railway extension, which was given, but is wholly omitted from this record. Therefore it cannot be asserted that this assessment of benefits was either contrary to the evidence or against the weight of it.

Why, indeed, did not the "view" aid the jury in determining the benefit to the railroad? Surely the surroundings and trend of improvements disclosed thereby may well and correctly have induced the jury to find the benefit, Mr. Lackey to the contrary notwithstanding.

Here is a populous and popular section of the city, where many buildings have been built and are building and land is rapidly advancing in value, and it is not doubted that since the verdict was confirmed the passenger traffic has paid interest on the capital invested and the running expenses of the extension. If, however, that point has not yet been reached, it will be in the near future, and at no remote period it will return a profit on the whole investment and repay all the expenses that have been previously incurred. Tested by the consideration of the interest on the cost of construction, increase by operating expenses, and probable increase of earning capacity, if need be, still the assessment of benefits is small. In fact, the assessment ought to be larger, considering the money value of the franchise.

In considering the testimony of Mr. Lackey, Justice Hag-

ner, presiding in the supreme court of the District of Columbia, said:

* * * * * * *

"Although the railroad company denies having been instrumental in this direction, the examination of Mr. Lackey, the railroad official (so far as his statements may be regarded as binding the company), fails to establish their contention. He admits, however, although he cannot speak for the company, that it wants the improvement, provided it is not to contribute toward its cost. But the act, from the title throughout, conveys the contrary idea, and substantially asserts that the railroad was the efficient cause of the passage of the act, since the widening of the road became necessary in order to accommodate the double tracks of the railroad. The existing width of the road and street might have been ample for the use of vehicles traveling along them if the railroad tracks were not to be laid over one-third of their width. It is alleged in behalf of the railroad company that the assessment made against them is inordinately large, and on that account alone should be declared invalid.

"From the testimony of Mr. Lackey, taken literally, the railroad company could not have afforded to build the road, but the result could not be as unfavorable to the company as he seems to believe, for, if there were no assessment at all against it in this proceeding, according to his testimony, the interest on the first cost of laying the new track would be $6,000 (or very close to $5,850), and the annual running expenses would possibly be $8,000, which would make about $14,000 as the annual charge resulting from the extension of the new track, and he says it would require one thousand passengers a day to make up this sum, and he does not believe there would be such an increase of travel. Assuming such passengers paid on an average between five and four and a half cents, the daily average receipts of these one thousand passengers would be $45.83; their yearly receipts from them would be

$16,720, or more than Lackey's estimate by $2,720; and the interest on the $25,000 assessment by the jury in this case at five per cent. would be $1,250, which, deducted from the $2,750, would leave a surplus from the $16,720 in the hands of the company of $1,470. But all this contemplates no increase of travel in all future time. Mr. Lackey says the cars run eighteen hours a day. Accordingly, if there were a thousand persons transported within the eighteen hours, in each hour there would be fifty-five persons, which does not seem an unreasonable estimate. But his estimate seems to be much too large, since the added cars used and the wages and expenses would not be chargeable entirely to this improvement; and the proportion of the wages and use of the cars, properly chargeable at first to this short line, would be a trifling part of the expense. It would be most short-sighted if the court should act upon this idea that there would be no considerable increase in the travel in the future, taking into consideration the proximity of the Rock Creek park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street, to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth Street road. I am obliged to repeat what I have previously said with respect to the exceptions by some of the land-owners, that I cannot say the finding as to the railroad company is wrong; certainly not manifestly wrong, and that I see no such injustice as to justify the conclusion that improper considerations influenced the verdict of the jury."

By what evidence is it demonstrated in this record that private property "in substantial excess of the special benefits accruing" (Norwood *vs.* Baker, 172 U. S., 279) to the railroad company has been taken?

We submit that nowhere on this record does it affirma-

tively appear that the railroad was not specially and peculiarly benefited by this extension of their route. That this assessed benefit was reasonably and fairly certain and so valuable we think that no one but the railroad's secretary can deny.

This assessment of benefits against the railroad company was, at the time it was made, no more remote and speculative than were the assessments for benefits along the unimproved and widened portions of Columbia road and Sixteenth street. The benefits did not accrue to these land-owners immediately upon the rendition of the verdict of the jury any more than the benefits thereby instantly accrued to the railroad company. The land-owners and the railroad company in that regard were in the same situation. The improvement of the streets benefited the adjoining property, and the extension of the railroad along this improved route benefited the railroad company, so that neither class of benefits was more remote or more speculative than the other. Can it be contended, then, that the benefits assessed against the land-owners were void because too remote, contingent, and speculative in their nature? The jury may well have found that the probable increase of travel reasonably to be anticipated from the extension of the railroad, considering the surroundings, justified this assessment.

Assuming, for the sake of argument, that the charter of the appellant company and its amendments gave such company a vested interest in its located route, yet it is submitted, whether placed on the police power or power of taxation, Congress had the right to require this road to carry passengers at rates not unreasonably low. How can this proceeding be said to be without process of law when notice and

hearing upon the question of benefits or no benefits was saved and granted to the company and availed of by it?

The authority of State boards of commissioners to exercise control over railways has always been upheld (N. Y. & N. E. Ry. Co. *vs.* Bristal, 151 U. S., 556–571; Charlotte, etc., R. R. Co. *vs.* Gibbes, 142 U. S., 386; Wis., etc., R. R. Co. *vs.* Jacobson, 179 U. S., 287–296).

Congress in this case, instead of arbitrarily determining the amount that the appellant company should pay for the new route acquired, provided for a hearing before and finding by a jury, which was, we submit, a properly constituted tribunal for the examination into the reasonableness of the question whether benefits should be assessed against the corporation, and, if so, the amount thereof. If the sum of money awarded as benefits be unreasonable or an undue increase of operating expense compared to the earning capacity to be derived from the extension, the burden is upon the appellant to sustain such contention by evidence, and there is no such evidence, we submit, in the record.

To the objection of the plaintiff that the assessment of benefits was unjust and unreasonable we further answer that there is nothing in the record to show on which property of the railroad the benefits were assessed, whether on the existing line, the extension, or both.

The railroad had the jury instructed by prayer 2 and by prayer 3 that it could only assess benefits against the company if satisfied that it will be specially benefited by the proposed extension of Columbia road. The company is now estopped, we claim, from asserting that such instructions were incorrect.

Indeed, by section 8 of the act of June 6, 1900, the trial

judge must be satisfied that the verdict was unreasonable or unjust; otherwise, on such ground, no reason for reversal exists. We again refer to the opinion of Mr. Justice Hagner (see appendix) in considering the objections of other property-owners that the awards and assessments were unjust and unreasonable, and the opinion of Chief Justice Alvey (Record, page 35).

We quote from Shoemaker *vs.* United States, 147 U. S., 304:

"In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.

"If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made. The rule on this subject is so well settled that we shall contend ourselves with repeating an apt quotation from Mills on Eminent Domain, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried

up so as to correct the report as being against the weight of the evidence. Hence, for an error in the judgment of the commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinion of experts or by the apparent weight of evidence, but may give their own conclusions.' "

The Court of Appeals in District of Columbia *vs.* Cemetery (5 App. D. C., 513) used the following language:

"But then, so far as concerns this appeal by the District, we fail to find anything on which to review the decision of the court below. The burden of complaint is that the valuation of the land was excessive. But we have not the means of correcting that, even if we had the authority so to do. There is nothing whatever in the record, except two *ex parte* affidavits, which, of course, we cannot regard, to show excessive valuation, or to show the grounds upon which the valuation was based. We cannot review, much less reverse, upon such a record as this. To the commissioners, and not the court, it must be remembered, the law has committed the matter of the determination of value."

The record of the testimony, so called, for and against the company was simply allowed to be filed as part of a petition (Record, p. 13), but would not the testimony respecting benefits and damages to the abutting property be necessary in order to determine whether this assessment is unjust?

II.

The charter of the appellant company being subject to alteration, amendment, or repeal, it follows that it may be compelled to extend its road in the manner required by the act of Congress.

When a charter is subject to amendment or repeal at the pleasure of the legislature it may be compelled to make alterations and construct works for the purpose of promoting the *public safety, convenience, and welfare* (1 Lewis Eminent Domain, sec. 156*e*).

In Holyoke Water-Power Company *vs.* Lyman (15 Wall., 500), it appeared that the Holyoke Company had by due authority constructed a dam across the Connecticut river to create a water-power to be used for manufacturing purposes. Subsequently, under legislative authority, commissioners of fisheries were appointed to determine and define a plan by which fishways were to be constructed by either agreement with proprietors of such dams at their own expense or upon their refusal so to do by the compulsory process of a bill in equity for specific performance.

The Holyoke Company refused after notice to construct a fishway required of it by the commissioners, and a bill in equity was filed by the latter to compel the company to build it.

It is noted in the opinion of the court that the charter contained no "provision exempting the builders and owners of the dam from the obligation to construct suitable and sufficient fishways for the free passage of fish up the river during their accustomed seasons."

But, nevertheless, the company insisted "that the acts of the legislature under which they have been *required* to make the fishways in question impair the obligation of the contract contained in the charter incorporating their grantors."

The court, in answer to this argument, said:

"Such a charter, when accepted by the corporators, is undoubtedly a contract that the powers, privileges and franchises granted shall not be restrained, controlled or destroyed without their consent, unless the power for that purpose is reserved to the legislature in the act of incorporation or some prior general law, in operation at the time the act of incorporation was passed. * * * or by some immemorial usage or general law of the State which was in operation at the time the charter was granted." * * *

"Vested rights, it is conceded, can not be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised and to almost any extent to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." * * *

"Fishways have never been constructed by the respondents in their dam, and they contend that they are not obliged to make any such provisions for the passage of the fish, as their charter does not create any such obligation, but the answer that the complainants make to that suggestion is decisive that the charter does not contain any provision exempting them from that implied obligation." * * *

"The terms and provisions of the charter are consistent with the theory that the legislature contemplated the construction of the dam with convenient passage-way for the fish, so as not to impair unnecessarily the rights of the riparian owners either above or below the dam and that the legislature if the company fail to fulfill that obligation, may

compel them to do so by more specific legislation." * * *

"Viewed in any reasonable light, it is quite clear that the charters of the respondents do not contain any stipulation or contract exempting them from the implied condition annexed to such a grant, not qualified by such a contract, that the corporation, in erecting such a dam, shall construct suitable and convenient fishways for the free passage of the fish to the head waters in their accustomed seasons; and that the charter, in view of the fact that it contains no such exemption, is subject to the power reserved to the legislature by the general law in operation when the charters were granted, that all acts of incorporation shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature" (Holyoke Water Power Co. *vs.* Lyman, 15 Wall., 500).

Nor is a provision for amendment, alteration, or repeal necessary when public safety, health, morals, or necessity is involved.

An illustration of this principle will be found in Chicago, B. & Q. R. R. Co. *vs.* Nebraska, 170 U. S., 57, where it was held that a railroad company could be required to repair a viaduct, under the police power. (See also Wabash R. R. Co. *vs.* Defiance, 167 U. S., 88.)

Where a railroad company was required by the legislature to remove its tracks from a present location involving the destruction of private property thereby, the excavation of a principal highway and the building of an expensive iron bridge beyond its charter provisions, which were, however, subject to the legislative power of amendment, alteration, or repeal, and where the lower court had held that the statute complained of as a taking of property without due process operated as an *amendment* to the charter, the decision

was against the railroad on the ground, among others, that law requiring these changes was an exercise of the police power of the State.

It was also urged, without avail, as claimed substantially by counsel for the plaintiff in error in this case below, that the charter of the corporation was not controlling, because it did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them under a corporate organization created by special law, was, nevertheless, private property (N. Y. & N. E. R. Co. *vs.* Bristol, 151 U. S., 556).

In Louisville, New Orleans, etc., R. Co. *vs.* Mississippi (133 U. S., 587), the validity of a statute of Mississippi which enacted "that all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations," was upheld.

The court said, in speaking of this section of that law:

"So far as the first section is concerned (and it is with that alone we have to do) its provisions are fully complied with when to trains within the State, is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State" (Louisville, N. O. & T. R. Co. *vs.* Mississippi, 133 U. S., 587).

In Minneapolis and St. L. R. Co. *vs.* Emmons, 149 U. S., 364, a statute was considered which required railway com-

panies to fence their roads and imposed a penalty on them for failure to do so.

It was objected that such requirement imposed a duty upon the company not required by contract, common law, or its charter, and therefore violated the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land- owner.

But the court replied :

"To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect. The objection that by allowing damages for the diminution of value in the adjoining farm caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages which we hold to be within the discretion of the legislature to impose" (Minneapolis & St. L. R. Co. *vs.* Emmons, 149 U. S., 364, 367, 368).

In Richmond, &c., Railroad Co. *vs.* Richmond, 96 U. S., 521, the question whether an ordinance of the city of Richmond directed against the use of steam in the propelling of cars along the streets of the city used by the railroad deprived the company of its property without due process of

law was considered and determined against the railroad. The court said:

"All property within the city is subject to the legitimate control of the Government, unless protected by 'contract rights,' which is not the case here. Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition."

Richmond, &c., Railroad Co. *vs.* Richmond, 96 U. S., 521.

This court said in Shields *vs.* Ohio, in sustaining the right of the legislature of a State to fix a prescribed rate of fare for railroad passengers where a charter was subject to a constitutional provision, that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed:"

"The constitutional provision (mentioned) entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was therefore valid. Parker *v.* R. R. Co., 109 Mass., 506."

"Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks."

"It is urged that the franchise here in question was property held by a vested right, and that its sanctity as such could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State."

"Where an act of incorporation is repealed, few questions

of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. Curran *v.* Arkansas, 15 How., 304."

"The power of alteration and admendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property or corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In Miller *v.* R. R. Co., 21 Barb., 513, the legislature, under the reserved power of alteration, required the company, which had been previously incorporated, to construct a highway across their road. The work was expensive and of no benefit to the company. The act imposing the burden was held to be void."

"In Worcester *v.* R. R. Co., 109 Mass., 103, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union station, and, after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter, or repeal the charters of those companies. See also Com. *v.* Essex Co., 13 Gray, 239; and Crease *v.* Babcock, 23 Pick., 334."

Shields *vs.* Ohio, 95 U. S., 319-326.

In the case approved by this court in Shields *vs.* Ohio, reported in 109 Mass., 103, it appeared that the legislature of Massachusetts had passed an act requiring the railroad companies named therein to unite in a passenger station in the city of Worcester; to extend their tracks in the city to the Union station, and after the extension to discontinue parts of their existing locations. The act also required the various roads to exercise the right of eminent domain and obtain the land necessary for the extension of their tracks at their own expense. All the objections which are now raised in this case to the constitutionality of the act of Congress of June 6, 1900, were raised by certain of those roads named in the act of the legislature of Massachusetts to the validity of that law, but the act was held by the supreme court of Massachusetts to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to "amend, alter or repeal." In that case the court said:

"The Boston and Albany Railroad Company must of necessity have a passenger station in Worcester; and it is obviously important to the public that all the other railroads named shall be connected with it. At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters, so as to secure such an object, was a reasonable exercise of their reserved right. It is no valid objection to such amendment, that they require corporations to extend their tracks and to exercise the right of eminent domain for this purpose, and to incur additional expense. The power to extend their tracks is often granted at their own request; and is granted with no less propriety when the interests of the public require it. The power to alter a charter includes the right to take away some of the powers granted by it, or to add new powers without which improvements of the greatest importance would be *ultra vires*.

Their compensation for the outlay is in the tolls they receive from travelers or others."

See also Fitchburg *vs.* Grand Junction Railway and Depot Company, 4 Allen (Mass.), 198.

The general proposition is thoroughly established that, in the absence of power reserved in the legislature to amend the charter or a provision in the charter that a majority of stockholders may accept an amendment thereto, the majority, by an acceptance of a material, radical, and fundamental change in the charter, can bind only themselves, and a dissenting subscriber will be discharged of his contract of subscription.

See numerous authorities at page 462 in the note to Com. *vs.* Cullen, 53 Amer. Dec., 463.

With this doctrine in view, it was held in two cases in New York that where, under a power to amend the charter, the legislature had extended the lines of a railroad in one case and a plank road in the other, that this extension did not release a subscriber, thus in effect holding that the extension of the road was not a "material, radical, and fundamental change" in the charter—or, in other words, to adopt the language of this court, the amendment was "consistent with the scope and object of the act of incorporation."

Railroad Co. *vs.* Dudley, 14 N. Y., 348.

Plank Road *vs.* Thatcher, 11 N. Y., 110.

Both of the last-mentioned cases were cited with approval in Miller *vs.* N. Y. (15 Wall. 478). In the latter case the amendatory act authorizing a city to elect seven directors of a railroad company instead of four, as theretofore provided,

was held to be a reasonable exercise of the reserved power to amend a charter.

Under a similar reserved power in the Code of Iowa it was held that the city council could require a street railway company to pave the street one foot outside of the tracks, although the original franchise only required paving between the tracks.

Sioux City Street Railway Co. *vs.* Sioux City, 138 U. S., at 107.

The case of Stanislaus County *vs.* San Joaquin & King's River Canal and Irrigation Company (192 U. S., 201) decides that the reduction of the rates of a water company organized under a general act of incorporation, wherein it was provided that such rates "Shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent. per month upon the capital actually invested," may be reduced to a less rate, assuming that the general incorporation law created a contract, because of the provision of the State constitution adopted in 1849, which provided:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

After a review of the cases the court said:

"These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonbly made, in good faith, and consistent with the scope and object of the act of incorpora

tion, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases. In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885.

"It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 per cent. upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it 1½ per cent. a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to 6 per cent. upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."

Stanislaus County *vs.* San Joaquin & King's River Canal and Irrigation Company, 192 U. S., 201.

III.

Section 3 of the act of Congress of June 6, 1900, required that the appellant corporation complete and put in operation this extended line within one year from the date of the widening of said highways. This extension has been made, and the company, having thus accepted, should be required to pay what the jury justly determined on due process this extension was worth.

If the railroad company desired the route, or if it did not but has accepted and operated it, could Congress require such company to pay for it? We answer in the language of this court: "The State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*" (B. & O. R. R. Co. *vs.* Maryland, 21 Wall., 456–475).

The assessments of benefits in the sum found by the method pursued is at least, according to the contention for the plaintiff in error, a bonus. We claim that it is valid either way—as an assessment or as a bonus.

If Congress had, as we contend, the power to require the further extension of this railway line, it undoubtedly possessed the power to provide for assessments of benefits against it in common with other property.

To sustain this contention we refer to the opinion of Mr. Justice Hagner, of the supreme court of the District of Columbia, in his ruling on these exceptions, printed as an appendix to this brief, and again to the opinion of Chief Justice Alvey (Record, page 34).

It is no unusual thing, however, to make assessments

against benefited property both a personal liability and a lien against the property benefited.

Welty, Assessments, sec. 310.

Mayor, &c., *vs.* Greenmount Cemetery, 8 Md., 517.

Clements *vs.* Balto., 16 Md., 208.

Thompson *vs.* Carroll, 22 How., 422.

Elliot on Roads and Streets, sec. 567.

In Rich *vs.* Chicago, 152 Ill., 18; 38 N. E. Rep., 55, it was held that an assessment for a sewer might be levied against non-abutting property which might subsequently use the sewer. See also McKee Land, &c., Co. *vs.* Swikehard, 51 N. Y. Supp., 399.

Under an ordinance requiring the costs of an award to be assessed upon contiguous property it was held that a railroad was within the designation of property which might be specially taxed for making the local improvement.

Chicago and Alton Railway *vs.* Joliet, 153 Ill., 649, and cases cited.

The decision in that case was followed in Indiana in Peru and Ind. Railway Co. *vs.* Hanna *et al.*, 68 Ind., 567.

In the expense of paving a street, part of which was assessed against a railroad company, it was held by the supreme court of Iowa to be a tax and collectible by suit from the company regardless of any lien.

Muscatine *vs.* C., R. I. & P. R. R., 79 Iowa, at 651.

A stronger case on this point is the decision of the supreme court of Connecticut, holding that the assessment might be

collected without regard to any lien on the property of the railroad company.

New Haven *vs.* Railway Co., 38 Conn., 422; 9 Amer. Reports, 399.

A case more like that at bar than any above cited, because of the greater similarity of the law which makes the assessment directly against the company, is that of *In re* Commissioners of Hampshire County, 143 Mass., 425.

A similar assessment against the appellant company was involved in the case of The District of Colnmbia *vs.* The Metropolitan Railroad Co., 8 App. D. C., 322.

See also Wash. & Geotn. Ry. *vs.* D. C., 108 U. S., 522.
Dist. of Col. *vs.* Wash. & Geotn. Ry., 4 Mackey, 214.
Dist. of Col. *vs.* Wash. & Geotn. Ry., 1 Mackey, 361.

The record (page 40) seems to indicate that the case is here by writ of error, but there is no statutory provision for a writ of error, and none would lie, for this proceeding was not according to the course of the common law.

2 Lewis, Eminent Domain, sec. 554.

Section 13 of the act of June 6, 1900, implies that an appeal is the appropriate proceeding, and we fail to find any bill of exceptions in this case as a basis for a hearing on error assigned.

We respectfully submit that the decree of the Court of Appeals (Record, page 35) should be affirmed.

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APPENDIX.

OPINION OF MR. JUSTICE HAGNER.

The remaining exception is that of the Metropolitan Railroad Company, which objects to the validity of an assessment against it to any extent for benefits, and excepting to the return by the jury.

It is necessary to note at some length the provisions of the Act of Congress particularly applying to the railroad company. The law was approved on the 6th of June, 1900, and is:

"An Act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth Street."

Of course, this title is not without some significance:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Metropolitan Railroad Company of the District of Columbia be, and the same is hereby, authorized and required to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia Road easterly along Columbia Road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street; Provided, That no cars shall be switched in the streets after the expiration of two years from the passage of this Act.

"SEC. 2. That before such *extension* shall be constructed Columbia Road shall be widened to a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia Road to Park street, and in such widening the building restriction line on the eastern side of street shall be taken as far as practicable to form the eastern side of said street when widened; and also sufficient land shall be required at the northwesterly corner of Columbia road and Sixteenth street so as to allow the street-railway tracks to be laid wholly without the roadway of

Sixteenth street, as extended according to the highway extension plans; all in accordance with plans to be prepared by the Commissioners of the District of Columbia; and the said Commissioners shall institute in the Supreme Court of the District of Columbia sitting as a District Court, by petition, particularly describing the lands to be taken, a proceeding *in rem* to condemn the land that may be necessary for the extension of Columbia Road and the present Sixteenth street as herein provided, with a width of one hundred feet: Provided, That the said Commissioners are authorized and empowered to *locate* the lines of the railroad of said company *within the area so to be acquired as aforesaid*: And Provided further, That the operation of the cars of the Metropolitan Railroad within the Capitol grounds shall be under the control of the Architect of the Capitol: And Provided further, That no tracks shall be laid on any portion of the roadway of Sixteenth street as extended according to the highway extension plans.

"SEC. 3. That the extensions of the lines of the Metropolitan Railroad Company herein provided for shall be completed and put in operation within one year from the date of the widening of said highways as herein provided, and said company shall deposit with the Collector of Taxes of the District of Columbia such sums as are necessary to pay the cost of inspection of said work.

"SEC. 4. That the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia Road and the present Sixteenth street, as herein provided, such proportional amounts thereof as the jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits, against *respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected*, and against those pieces or parcels of land on each side of Columbia Road and the present Sixteenth street northwest, along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land

and the benefits they may severally receive from the extension of Columbia Road as aforesaid: Provided, That if the aggregate amount of the benefits to be assessed against those pieces or parcels of land on each side of said Columbia Road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited, as determined by said jury pursuant to the provisions hereof is less than one-half of the amount of damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, within thirty days after the filing of said award, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void.

* * * * * * *

"SEC. 10. That when confirmed by the Court the several assessments herein provided to be made shall severally be a lien upon *the land* assessed, and shall be collected as *special improvement taxes* in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of 4 per centum per annum from the date of confirmation until paid."

It is alleged on behalf of the railroad company that the assessment is unauthorized because it has no property in the neighborhood of the improvement that could be assessed, and the actual charge that has been made against the company in the form of an assessment, is only a personal one which could not be usually made under the act. In support of this contention the counsel for the railroad company referred to a case in 42 Lawyers' Annotated Reports, 636, Asbury *vs.* Roanoke.

In that case it was decided that a law assessing benefits and making such assessments a lien on the land and a personal debt against the owner, was not in accordance with a provision of the Constitution of Virginia, and was, therefore, unlawful.

But this decision cannot control the main point in the case before us, since we are not now concerned with the question of the mode of collecting the assessment directed by the statute.

In 36 Barbour, 131, People *vs.* Lawrence, the Court said in reply to such an objection:

"If the legislature failed to make a valid provision for the collection of the assessment, or should impose a lien, not legal under the constitution, neither circumstance would affect the amount found, since the legislature may thereafter remedy the defect by future legislation."

The decision is also entirely at variance with the ruling reported in the same volume, page 48, Rolph *vs.* Fargo, in which the Dakota Court decided that a statute which authorized an assessment for benefits according to the front feet of the respective lots, was entirely constitutional, and it was not necessary the assessment should be according to the actual benefits received by each.

The opinion of the Court in Rolph *vs.* Fargo, page 649, calls attention to the fact that the taxpayer in ordinary cases (as in taxes for public schools, water supplies, licenses, &c.,) cannot object to their legality because he has not received commensurate benefits, or has not been consulted in advance, and that such objections are presented in land condemnation cases for no better reason than because of the greater ease of examining the question.

In 54 New Jersey Law Reports, also referred to by counsel for the railroad company, page 144, the act of the legislature there criticised, did not profess to include the property of the railroad company which was assessed, and none of the other cases are decisive of the contention of counsel. But suppose it to be necessary that the railroad company should possess real property near the proposed improvement, how stands the Metropolitan Company in this particular?

That the tracks of a railroad company in a street are

property that may be assessed in condemnation proceedings is clear (90 Illinois R. R. Co. *vs.* the City of Chicago, 573; Welty on Assessments, Sec. 200, note; 32 Cal. North Beach & Mission R. R. Co., 506).

"SEC. 200. Liability to Assessments.—A right of way granted to individuals or a corporation, authorizing the construction of a railroad over a public street or highway, and of operating cars thereon, for the purpose of carrying passengers for hire, and authorizing the collection of fare for such service, when such railway is constructed, becomes an easement in the soil upon which the railroad is laid and is such an interest in land as to be assessable as real estate. The fact that the railway is laid upon a public highway or street makes it no less an easement. The dedication of land for a public highway, is a dedication to the public and does not deprive the owner of any use of the land not inconsistent with such dedication. It is not a dedication for railway purposes or uses, and when a right of way is granted over the same land for a railway, the owner whose land was originally taken for a public highway—at least, when the land does not constitute a public street—is entitled to damages for the new additional use." (Welty on Assessments.)

"A franchise is property. The corporation owns property. For a long distance its track passes through a widened thoroughfare on which the travel must be greatly increased, bringing a corresponding increase of profits to the company. It would require a most flexible rule of law to establish a right of exemption in this property from contributing to an assessment of public improvement which so greatly enhances its value and profits; and we contend that no such rule has been shown." (32 Cal., 506.)

That is the case of the North Beach and Mission Railroad Company, decided by Mr. Justice Sawyer. There the first question was whether the interest of a street railway company authorized by statute to lay down tracks in a street of the city and run cars thereon for the purpose of conveying passengers, is an easement invested in such company; whether such interest of the company is enhanced in value by the widening of the street, and whether by means thereof

any substantial benefits can accrue to the company. Those questions the Court discusses at great length, and shows by a number of authorities that an easement is property, recognized as such by law. Whether the burden upon the company was imposed in a proper way, the Court held that, with its acceptance "it became a contract between the parties binding each to the observance of all its provisions."

The Court said:

"It was something more than a mere executory contract between the parties. *It amounted also to an immediate grant of an interest, and it would seem of a freehold interest, in the soil of the street to the defendants. The rails when laid would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns.* * * * Does the statute prescribe or authorize a different rule of apportionment of the expenses of the work with respect to appellant and other companies and corporations, from that applied to owners of land within the district benefited?

"Appellant insists that it does; that the owners of lands are to be assessed in the ratio of benefits received, while companies, appellant, are to be assessed arbitrarily in the discretion of the Commissioners as to them shall seem equitable and just, without reference to benefits likely to accrue, and that the act is, in this particular, unconstitutional. In construing statutes the object to be accomplished by the act is to be ascertained, and its provisions considered and so construed, if possible, that all its parts may have effect and operate harmoniously to perpetuate that object. In view of this principle, let us examine the statute under which this proceeding was had. Section 1 authorizes the Board of Supervisors to open, widen, and improve streets, etc., and take private lands for that purpose, etc."

After giving a description of the different sections of the Act the Court says:

"If the improvement is of so important and beneficial a character to the whole city and county as in the opinion of the Board of Supervisors it ought to be a charge upon the city and county, all the taxable property in the county is to

be assessed, and the assessment is to go upon the general assessment roll of the city and county.

* * * * * * *

"We think, upon a reasonable construction of the Act, the only principle of apportionment authorized is according to the ratio of the benefits received—that this principle of apportionment applies to railroad corporations, and companies, as well as to owners of land deemed benefited. The principle of apportionment prescribed is, therefore, uniform and not liable to the constitutional objection suggested.

* * * * * * *

"Did the Commissioners apportion the amount among the owners of lands and the appellant according to the benefits received by each?

"There is nothing in the record to show—and we have no reason to suppose—they did not. The Act, as we have seen, upon a reasonable and proper construction, requires the apportionment to be so made. Such, we think, would be the construction that practical business men, at all competent to perform the duties, would put upon it; and we have no doubt that the Commissioners so construed it." (32 Cal., 506.)

By the Act of Congress before us a franchise or concession is given to the railroad company to occupy Columbia Road east of Eighteenth street and Sixteenth street, as far as Park street, with its double tracks. Such a concession constitutes a property existing in the company, notwithstanding it has not yet taken possession of the road and laid its tracks there. This is within the principle of the decision in 4 Gill & Johnson, 144–5, and Canal Company *vs.* R. R. Co., 12 Peters, 97; Georgetown *vs.* Alexandria Canal Co., 21 Md., 131; The United States *vs.* Great Falls Co., 21 Md., 131.

"If the Canal Company had come into existence immediately, and before the railroad charter was granted, it would have taken a vested right to choose a route for the site of the canal in the valley of the Potomac, along either bank of the river, except at the upper terminus, which, whether at the mouth of Savage Creek, according to the original charter, or

at Cumberland, according to the mandatory Act of the December Session, 1826, is confined to the Maryland shore, both of those places being on that shore, and specifically designated for the upper termination of the eastern section of the canal, a right created by the charter, and existing independent of any survey or act of location or of condemnation, which would be but an exercise of that right. And if the railroad company had afterward been chartered and organized, before any exercise of that vested right by the Canal Company, it could not, by any act of location or appropriation, have defeated or overreached it. The prior grant that gave, would have preserved the prior right. It would have been a corporate right, a vested franchise, to select the most suitable ground for the construction of the canal within the assigned sphere of action, which neither of the sovereign grantors alone, nor all together, could by any direct legislative act have taken away or repealed; and much less could it be taken away or disturbed by the act of any other corporation. This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire or hold land such as every individual possesses; but, in addition to such capacity, it is a right or privilege, a portion of the eminent domain vested in the corporation to acquire the legal title to land subordinated by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particular purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise. And although the Canal Company was not actually incorporated and had not accepted the charter before the railroad company was chartered and organized, yet it is entitled to all the rights, benefits, and liberties with which it would have been invested, if it had been organized before any antagonistic corporation came into existence." (4 Gill & Johnson, 144–5.)

"Congress then, having the power, authorized the Alexandria Canal Company 'to cut canals, erect dams, open

feeders, construct locks, and perform such other works, as they shall judge necessary and expedient, for completing the canal, from the termination or other point on the Chesapeake & Ohio Canal, to such place in the town of Alexandria as the Board of Directors shall appoint.' Now, as one of its termini was authorized to be either the termination, or some other point on the Chesapeake & Ohio Canal, and the other some place in the town of Alexandria; and as the Potomac lies between these termini, the authority to construct an aqueduct was granted *ex necessitati*." (Canal Co. *vs.* R. R. Co., 12 Peters, 97.)

There is another case in 21 Maryland, pages 131, 132 and 133, The United States *vs.* The Great Falls Manufacturing Company.

In 1852 Congress made an appropriation for the purpose of procuring, from such place as the President of the United States should approve, a supply of water for the cities of Washington and Georgetown, and granted permission to build an aqueduct to bring the water from the Great Falls. The Great Falls Manufacturing Company owned the place where General Meigs, representing the United States, wanted to build a dam. Leave had to be given by the State of Maryland for the canal to be brought through that State, and the Legislature of the State of Maryland passed a law (Act of 1853), Chapter 179, to this effect:

"That if the plan adopted by the President of the United States for supplying the City of Washington with water should require said water to be drawn from any other source within the limits of the State, consent is hereby given to the United States to purchase such lands and to construct such dams, reservoirs, buildings and other works, and to exercise, concurrently with the State of Maryland, such jurisdiction over the same, as may be necessary for the said purpose."

Under this law of the State of Maryland an inquisition of damages was had. In the State of Maryland all the land from the Great Falls down to the Georgetown line was condemned. The Great Falls Company presented its claim, and

the jury impaneled gave that company $100,000. It appeared in that case that the jury had taken into account, first, the water; and secondly, the soil where the abutment and dams stand, and both, they assumed, belonged to the Great Falls Company. The award was set aside. The judge decided that a man could "use the water of a river while in his hands," could drink it all up, if thirsty enough; but when once it escaped, it could no longer be a subject of value to him. But, the court said, the bottom of the Potomac River belongs to the State of Maryland. The parties in that case did what they were authorized to do—filed their affidavits, presented proof, and got their patents for these little islands up here. The case went to the Court of Appeals, and some eminent lawyers argued the case for the United States. It was insisted on the part of the Great Falls Company, of course, that the bottom of the river belonged to the State of Maryland for which land the company held patents. But it was said in behalf of the United States that this statute passed by the State of Maryland was a donation of that land at the bottom of the river prior to the date of these patents.

"The assent of the Legislature, given in the first section of the Act of 1853, to the purchase of such lands, by the United States, as should be found necessary for the purpose designated, must, therefore, be construed as a grant of a right to purchase, which the State was not at liberty to qualify or impair by any subsequent Act of the Legislature, or of its public officers. The power to enter upon and appropriate lands by process of condemnation, conferred upon the United States, is restricted by its nature, as well as by the terms of the Act, to the property of private persons, and under these circumstances the grant of the right to purchase clearly implies, so far as the State was the owner of lands that might be required, the promise or undertaking on its part to hold them subject to that right of purchase granted to the United States. If it were not so, the State would be able by refusing to part with, or hold its lands for the use proposed, to defeat the right granted, as well as prevent the

execution of the purpose contemplated by the Act of Congress to which its consent had been given in the solemn forms of a public law. The mutual intention and purpose of these acts clearly forbids any interpretation of their several provisions leading to such result.

* * * * * * *

"The theory that any right is retained to oppose or qualify the powers and privileges granted to the United States by this Act, is supported neither by reason nor authority; and we are constrained to say, that it should be repulsed by every public officer and tribunal charged with the duty of maintaining the good faith and honor of the State."

(21 Md., U. S. *vs.* Great Falls Co., pp. 131–2–3.)

The Act of Congress conferred a property of so high a nature on the Metropolitan Railroad Company that Congress would have had no right to divert it from them and confer upon a rival railroad company the power to lay tracks on the Columbia Road in the place already dedicated by it to the Metropolitan Road.

In 27 New York, 620, Millbau *vs.* Shark, it was held that the resolution of a competent authority authorizing parties to construct a railroad over the street, if valid, will create an immediate grant of an interest in the recipient company. In that case the corporation authorities of New York undertook to confer upon individuals a franchise for constructing and operating a railroad in Broadway for their private advantage. A bill was filed for an injunction to prevent it by Mr. Dudley Field, and he insisted that this grant by the authorities of the city to this railroad would be a real grant, and its existence would be a menace to the welfare of the people. The reply, on the other hand, was, that the grant was revocable and could be withdrawn.

"The plaintiffs allege that the defendants, immediately after the passing of the resolution of the Common Council, signified their acceptance thereof, and agreed to conform thereto, by writing, filed in accordance with the resolution. That the defendants, under color of the authority con-

tained in said resolution, threatened to enter upon Broadway, and take up the Russ and other pavements and dig up and subvert the soil in that part of Broadway between Whitehall and Fifty-ninth streets (including the portion thereof belonging to the plaintiffs), to take possession of said street, and lay down and establish a railroad therein and run cars thereon, for their own private interest and emolument to the great injury and damage of the plaintiffs, and other property owners on and in said street, and to their and each of their property, without making to them or either of them any compensation therefor."

When we come to the decision, the question is, What did that railroad get?

"The provisions giving the right to lay the track of the railway, determining its location, width and manner of construction, the quality of the cars, the times of their running, the motive power to be used, the mechanism, rates of toll to be charged, the amount of license fees to be paid, and the duration of the privileges granted, are all parts of a single scheme, which are incapable of separation. The whole scheme is valid, or no part of it. These privileges, whether they create a monopoly or not, constitute a franchise. The definition of franchise, by Bouvier, is a 'privilege conferred by grant from the Government and vested in individuals.' Kent says, 3 Com., 458: 'The privilege of making the road, or establishing a ferry, and taking tolls for the use of the same, is a franchise.' Railroads do not form an exception. (3 Paige, 45, 14 N. Y.) Monopoly is not an essential feature of a franchise. A corporation with banking powers would be no less a franchise, if there were no law restraining private banking, which alone gives to banking corporation the character of monopolies.

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"Prior to its aeceptance by the defendants, the resolution was only a proposition having no binding force whatever. It was certainly not then a law, and since that time the Common Council have taken no action upon it. Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of its provisions. It was something more than a mere executory contract between the parties. It amounted also to an intermediate grant of an

interest, and, it would seem of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it."

According to these authorities the Act of Congress conferred upon the railroad company the right to lay down its double tracks upon sufficient land, at the northwesterly corner of Columbia Road and Sixteenth street, which the Act directs should be acquired by the company; and such land, when so acquired as land of the company, will be answerable for the benefits assessed against the company. Moreover, the existing tracks of the company have been already laid as far as the western limits of Eighteenth street, on Columbia Road; and the extension of these tracks authorized by the Act before us, will commence at a point in immediate contact with the eastern limit of the existing tracks. When the new tracks shall have been laid down, they will form a part of the continuous line of tracks extending from that point to the remotest boundary of the company's road, and the new tracks will be then as much a part of the Metropolitan Railroad as the old tracks were, and any charge against the company in respect of the new tracks by way of assessments for benefits, will be against the entire track of the railroad company throughout the city, and its franchise as well.

This matter was examined by Mr. Justice Cox in case 17937 Equity, Anacostia R. R. *vs.* District, and in case 17681, Belt Co. *vs.* District, where it was held that it was impossible to segregate a portion of the road and sell that distinct from the rest of the track—that the franchise and all the property of which the railroad company was owner constituted its possessions and was answerable for its engage-

ments. As the existing tracks, as they now are situated up to the west side of Eighteenth street, are in immediate contact with the line of the projected improvement, it would be difficult to point out why that road already laid may not be considered as property of the company sufficiently near to the new improvement to justify an assessment of benefits under the statute.

But I see no reason why Congress in the exercise of the power of taxation could not properly direct the Commissioners to assess against the railroad company a sum, which, in their judgment, was commensurate with the advantages it would receive from the extension of its tracks in the manner proposed, without a reference to its condition as a holder of land in the vicinity.

In 135 United States, 345, Spencer and Merchant, land owners, who had been excused from a prior assessment for want of notice, were assessed a second time under a subsequent law for the sums from which they had thus been relieved, together with interest and costs of the litigation. The Supreme Court held that such a law, adding the interests and costs to the first assessment, as within legislative discretion, which was not to be controlled by the courts, although in the particular case it could not be contended that the benefits were commensurate with the charges exactly under the second law, and the costs and interest were assessed without any reference to any benefits to land, and were not assessed upon the land at all.

It is true this mode of assessing may be an unusual one here with respect to street openings; but it could not be denied that Congress might require a railroad company, and as the price or consideration of a franchise extended to it, to pay a sum, either to be named in the law by Congress itself, or to be ascertained by a jury of inquisition, to be applied to the expense of the improvement. Such requirements have been constantly made in charters granted to railroad companies; a familiar instance is the case of

the Baltimore Street Railway Company, when one-fifth of all the gross receipts of the railroad company when chartered were required to be paid to the city for some return for the valuable franchise conferred upon the street railway; and the great park in Baltimore has to a large degree been paid from the proceeds of this assessment or tax. Congress having reserved the right to alter the charters of these street railway companies at its pleasure, might well, subsequent to their incorporation, make a similar exaction when called on to amend a charter by extending the line of the operations of the road. This is precisely what is being done in the present case. This great road, with its numerous far-reaching franchises, has thus far been called upon to make no contribution to the public in the form of a price for the franchise given it. Congress authorized, as appears in the statute before us, the enlargement of the powers of the railroad company by giving it a new field of operation, which it is obvious must be beneficial to the railroad, enabling it, as it would do, to land passengers in much nearer proximity to the Great Zoological Gardens, and to the village of Mt. Pleasant, and ultimately, by preoccupying the ground, to procure a still further field of operation to the utmost limits of Sixteenth street, when extended.

It would be strange, indeed, if no power existed in Congress, under such circumstances, to make some exaction in consideration of this benefaction and practical monopoly—of a kind which in many cities have been often a source of great wealth to those receiving them.

The Baltimore & Ohio Railroad, when first incorporated, was by the terms of its charter exonerated from all taxes; and as the result, in progress of time, its hotels with their furniture, its great steamships plying to Europe, its elevators and wharves in Baltimore, and a variety of property which no one would hold as a necessary part of a railroad, returned no revenue watever to the State by way of taxes. But

when the railroad company found it necessary or expedient to procure amendments to its charter, the Legislature provided that all the classes of property of the character I have named should thereafter be subject to taxation; and the validity of this tax has not been denied by the courts.

That the widening of the road and street would be beneficial to the railroad could not be doubted—it would be impossible for the double tracks to be laid on Columbia Road and Sixteenth street unless they had each been widened, and it would be inequitable that the company, which would be so largely benefited, should be the only property holder in the neighborhood that should not bear part of this charge. The same equitable consideration applies to this that applies to the large majority of taxes. In numerous cases the law expressly directs that part of the expense of opening these roads should be charged against the District; by the present law the tax-payers in general in the District are required to pay one-half. Where is there any evidence in this case of any benefit to the tax-payers in general from the condemnation? And yet this jury has mulcted the citizens in general with $90,000 which they must pay without a murmur.

The gross expense of the condemnation as stated by the jury is $180,000; one-half of which, about $90,000, is thus chargeable against the people at large, a large portion of whom have never seen the property in controversy and may never use the road in any way; and will, at the most, use it at very rare intervals.

The assessable property in the District is estimated at $190,000,000. If we had a few citizens here like Carnegie, the Vanderbilts, Astors, Rockefellers, and Goulds, they might well own one-half of this amount in real estate in the District and thus would be required to pay one-half of $90,000 toward the cost of opening these streets; and yet no one of them would ever be consulted by Congress or anybody else as to the necessity or propriety of opening the road, so far as the public is concerned, or as to the extent of benefits that

may be received by the public at large; although, according to the supposition I have made, the tax-payers would thus be compelled to pay in silence the sum of $45,000, more than thirty times as much as the jury has charged against this private land-owner in the neighborhood of the improvement, who has been assessed to pay the largest sum for benefits, and nearly twice as much as has been assessed against the Metropolitan Railroad.

It seems absurd for the land-owners along the line of this projected improvement gravely to contend that they are not to be permanently benefited by the opening of wide streets in the neighborhood of their lands now lying useless and unproductive, with the advantage of having sewerage and lighting and other comforts at the public expense; and it is equally absurd for the railroad company to contend that it will not certainly be benefited by the public outlay which will afford them the opportunity to extend their lines in the manner authorized and directed by the Act before us. Yet such is practically the position of both classes of property-holders who are objecting to this award.

In Cooley's Constitutional Limitations, the author (496) discusses the various methods of assessing property:

"There are some kinds of taxes, however, that are not usually assessed according to the value of property, and some which could not be thus assessed. And there is probably no State which does not levy other taxes than those which are imposed upon property. Every burden which the State imposes upon its citizens with a view to revenue, either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of taxes or under some other designation. The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes; the tolls upon persons or property, for making use of the works of public improvement under and controlled by the State, are a species of taxes; stamp duties when imposed are taxes; and it is

not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually, in proportion to their capital stock, or by some other standard, and each is the mode regarded by the State as most convenient for the taxation of such organizations. It is evident therefore that the constitutional requirements sometimes met with, that taxation upon property shall be according to value, do not include every species of taxation; but all special cases like those we have here referred to are, by implication, excepted."

If the railroad company was instrumental in procuring the passage of the Act, it is doubtful whether it can now question its validity, said Judge Shiras in delivering the opinion of the Court in the case of Wright *et al. vs.* Davidson *et al.:*

"It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the 'Kall' tract mentioned in the first section of the Act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the streets to be extended; and, it appears by the record that, in order to procure the desired action of the Commissioners, they did dedicate to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second, and Decatur streets.

"Prior to the filing of the petition of the Commissioners the authorities of the District had taken no steps toward the contemplated extension of these streets. In fact, under the act they had not power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the Act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"'Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and

encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect.' Cooley on Taxation, 573; Tark *vs.* Adams, 10 Cush., 252; Bidwell *vs.* City of Pittsburg, 85 Pa. St., 472; Lafayette *vs.* Fowler, 34 Ind., 140; Shutte *vs.* Thompson, 5 Wall., 151, 159."

Although the railroad company denies having been instrumental in this direction, the examination of Mr. Lackey, the railroad official (so far as his statements may be regarded as binding the company), fails to establish their contention. He admits, however, although he cannot speak for the company, that it wants the improvement, provided it is not to contribute toward its cost. But the Act, from the title throughout, conveys the contrary idea, and substantially asserts that the railroad was the efficient cause of the passage of the Act, since the widening of the road became necessary in order to accommodate the double tracks of the railroad. The existing width of the road and street might have been ample for the use of vehicles traveling along them if the railroad tracks were not to be laid over one-third of their width.

It is alleged in behalf of the railroad company that the assessment made against them is inordinately large, and on that account alone should be declared invalid.

From the testimony of Mr. Lackey, taken literally, the railroad company could not have afforded to build the road, but the result could not be as unfavorable to the company as he seems to believe, for, if there were no assessment at all against it in this proceeding, according to his testimony, the interest on the first cost of laying the new tracks would be $6,000 ("or very close to $5,850"), and the annual running expenses would possibly be $8,000, which would make about $14.000 as the annual charge resulting from the extension of the new track, and he says it would require one thousand

passengers a day to make up this sum, and he does not believe there would be such an increase of travel. Assuming such passengers paid on an average between five and four and a half cents, the daily average receipts of these one thousand passengers would be $45.83; their yearly receipts from them would be $16,720, or more than Lackey's estimate by $2,720; and the interest on the $25,000 assessment by the jury in this case, at five per cent., would be $1,250, which, deducted from the $2,750, would leave a surplus from the $16,720 in the hands of the company of $1,470. But all this contemplates no increase of travel in all future time. Mr. Lackey says the cars run eighteen hours a day. Accordingly, if there were one thousand persons transported within the eighteen hours, in each hour there would be fifty-five persons, which does not seem an unreasonable estimate. But his estimate seems to be much too large, since the added cars used and the wages and expenses would not be chargeable entirely to this improvement; and the proportion of the wages and use of the cars, properly chargeable at first to this short line, would be a trifling part of the expense. It would be most short-sighted if the Court should act upon this idea that there would be no considerable increase in the travel in the future, taking into consideration the proximity of the Rock Creek Park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street, to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth street road.

I am obliged to repeat what I have previously said with respect to the exceptions by some of the land owners that I cannot say the finding as to the railroad company is wrong; certainly not manifestly wrong, and that I see no such injustice as to justify the conclusion that improper considerations influence the verdict of the jury.

The exceptions of the railroad company are, therefore, overruled, and I will sign an order confirming the award of the jury with the exception of the Deering claim.

CLAPP CASE.

OPINION OF MR. JUSTICE HAGNER.

Numerous as are the exceptions to the award of the jury, the parties objecting do not constitute one-tenth of the persons interested, which tends to show that the work of the jury upon the whole was performed in a proper manner.

As the exceptions were filed before the decision of the Supreme Court of the United States in the Davidson case, they very generally embody the various objections—"want of notice" and "unconstitutionality"—which were sustained by the Court of Appeals in their decision in that case. It is, of course, unnecessary now to examine this class of objections, since the law has been settled otherwise by the Supreme Court.

The great mass of the remaining exceptions relate to objections based upon the alleged insufficiency of the valuations affixed by the jury to the portion of the property condemned for the widening of Columbia road and of Sixteenth street, and of the alleged exorbitancy of the assessments upon the various properties found by the jury to be benefited by the proposed improvement.

The general rules respecting exceptions for errors on the part of commissioners or juries in the valuation of lands, or in the assessment of benefits against them, have been so repeatedly stated by the Courts that it is hardly necessary to quote from the authorities; but the following may be assumed as settled principles governing the subject.

The report of the commissioners or jury is assumed to be correct, since to them and not the Court the law has confided the function of determining the values. Where there is no evidence of misconduct on the part of the jury, the Court will not set aside the verdict on the ground that it is ex-

cessive, unless the amount awarded appears to be manifestly wrong, and this, even where the evidence of one of the jurors is filed stating that in his opinion the verdict is too high; or, as elsewhere expressed, when complaint is made of error in the valuation of land taken, the judgment of the commissioners, when lawfully exercised in the absence of strong objections, is conclusive.

"Where the proceedings are before a Court and the tribunal is appointed by the Court, a report should be made to the Court, although not expressly required by statute, and the Court can accept or reject the report as justice may require. As the Court acts judicially in such matters, it can only act upon them in term time, unless by express provision of the statute. Though the statute provides that the report of commissioners shall be final and conclusive, it may set aside for fraud or misconduct. It means that, upon matters committed to the charge of the commissioners, their judgment shall be conclusive when lawfully exercised. A statute provided that the court should not set aside the report of surveyors for illegality or irregularity. It was held to refer to *matters of form* merely, and not to matters of *substance*.

"Sometimes statutes provide that the Court may set aside reports for good cause shown, or for sufficient cause. Under such statutes the practice would be the same as in any case where the Court had power to act in the matter of accepting or rejecting the report. And, though the statute authorizes the court to direct a new appraisal before the same or new commissioners, *at its discretion*, it was held that the Court should not interfere unless some substantial error had been committed. In general it may be said that good grounds for setting aside a report are, any defect or insufficiency in the proceedings prior to the appointment of the tribunal, which would have been an adequate reason for refusing the appointment and which have not been waived by the objector, or any mistake, irregularity, or partiality in the proceedings of the tribunal materially affecting the merits of the case."

(Lewis on Eminent Domain, Sec. 520.)

Where it is not really shown that substantial injustice has been done, the proceedings of the jury will be approved, the

presumption being that the jury took in account all the facts bearing upon the question of damages, and that there was no bias on their part in the way of a fair verdict. Especially are the courts indisposed to set aside the verdict of a jury in cases where the jury have viewed the premises.

"The report of the verdict may be set aside on the ground that the damages awarded are too much or too little. In setting aside a report on the question of damages, the Court will be governed by the same principles as obtain in the case of the verdicts of juries in common law suits. Where there is evidence to sustain the verdict and the testimony is conflicting, the Court will not interfere; and especially is this the case where the commissioners or jury have viewed the premises. Where the owner petitions for damages, it is error to allow him more than he claims in his petition. Or a petition to condemn a piece of land large enough for a telegraph pole, adjacent to a railroad over one hundred and fifty feet across defendant's track, there being eleven poles on defendant's land, a verdict for $3,850 was set aside as grossly excessive. A verdict or award which is more than the amount testified to by the witnesses of one party and less than the amount testified to by the witnesses for the other, will not be disturbed on the question of amount alone. Where the award was $50,000, and the petition dismissed the proceedings and commenced anew, and a second award was made of $18,000, the Court, in view of the great discrepancy in the two reports and the conflicting evidence as to value, granted a new trial. Where the first report was set aside because only nominal damages were awarded, and a second report was made also for nominal damages, and no irregularity appeared, the Court refused to set aside."

(Lewis on Eminent Domain, Sec. 524.)

When the jury of condemnation are authorized and required to view the premises, their functions are in the nature of those exercised by assessors rather than those of jurors, as in ordinary cases, since the purpose of the view is to furnish evidence to the jury; and the Court cannot re-examine the merits of the report of the viewers and set it aside for mere inadequacy, although the law under which

they are acting authorizes the report to be heard and affirmed or set aside, as may be lawful and right.

(Pa. R. R. Co. *vs.* The First German Lutheran Congregation of Pittsburg, 83 Pa. State, 447.)

In 84 Mo. 412, City of Kansas *vs.* R. R., the Court said when the verdict is not so flagrantly unjust as to justify the conclusion that improper considerations influenced their verdict, the Court cannot interfere; the view is evidence, and the Court cannot see how far their verdict is rendered on the other evidence, and how far it is attributable to their own observation and judgment.

The amount of compensation is to be determined by the jury from the actual survey of the premises when practicable, from their own knowledge of the valuations, and from the opinions of witnesses familiar with such matters; but they are not bound by the opinions of the witnesses as to the estimate of value or damages. They are not like juries in ordinary civil and criminal cases, bound by the weight of the evidence, but may be governed actually by the view itself. (9 Gill and Johnson, 479, Tide Water Canal Co. *vs.* Archer.) Or as was expressed (in 54 N. J. L. Rep., Davis *vs.* Newark) by the Court in speaking of exceptions to alleged excessive charges for benefits:

"To justify interference on this ground, evidence that the judgment of the commissioners was erroneous must be cogent. I have not been able to find in the evidence sufficient to satisfy me of any error on the part of the commissioners. There is much difference of opinion, however, based on the same facts; but I see no reason to overthrow the judgment of the commissioners who gave special attention and care to the judgment."

The testimony to invalidate the verdict in a case of this character as to the ascertainment of damages and the assessment of benefits almost always consists of that of the parties to the proceedings testifying for themselves and for others

similarly situated, sometimes of the attorneys representing parties holding the lands in controversy, and at other times representing other lands similarly situated; and there must be very fair witnesses against the awards who do not occupy one or more of these relations to the subject.

Much of this testimony appears to have been based merely upon the observation of the land by the witnesses; and it appears, so far as the Court can find anything in the record bearing on the subject, that such observation was of short duration. On the other hand, the judgment of the jury, by the terms of the Act of Congress, was required to be rendered by seven judicious and disinterested men, not in the service or employment of the District of Columbia or of the United States, to be summoned by the Marshal for the District, men who should make oath that they were not in any manner interested in the land to be condemned or in any way related to the parties interested therein; and in the present case these persons, acting under this oath of office and admitted to be men of high character, were engaged in the examination of every portion of these lands for a much longer time than any of the witnesses who were adduced to impeach the award, and they heard the entire testimony respecting each finding returned by them under their oaths.

These commissioners, with the single exception of the case of Deering, with respect to lot 18 in block 14 where a mistake of $50 is said to have been made, are unanimous in their assertion that their verdict was, as they had sworn it should be, just and fair to all persons interested. The only intimation of anything like misconduct on their part is contained in the account of a conversation with one of the commissioners, Mr. Towles, as to the manner in which the jury arrived at certain of their valuations. That testimony was intended to show that some, at least, of the assessments of benefits were arbitrarily increased for the purpose of aggregating a sum equal to one-half of the gross amount of the damages returned. But, assuming that conversation to

have been correctly understood and reported and as truly representing the impressions of Mr. Towles (which is disputed by him in his affidavit and denied by others of the jurors), there is nothing to show that any others of the jurors entertained any such views. Unless this were shown to be the case, the individual opinion attributed to Mr. Towles could not be taken as invalidating the opinions of the other six jurors. In 51 N. Y., Supplemental Reports, p. 406, McKee Land & Improvement Co., of Rochester, *vs.* Swikehard *et al.*, it was held that, improper remarks by one of the commissioners, in regard to their assessing property for a sewer, not having been shown to have affected the action of any other member of the commission, was not to be considered as prejudicial to the owners of the land. The Court said:

"Testimony was introduced, and much is claimed for it to show that one of the commissioners (Luetchford) was governed by improper considerations in his actions upon the commission in the assessment of the McKee tract. His language was approved, and cannot be defended. It did not, however, occur at any time when action was being taken as to the McKee tract. In fact, a preliminary statement of the apportionment had already been prepared before Luetchford's remark, which, when applied to the McKee tract, shows that the McKee assessment had been practically arrived at by informal action of several members of the commission before Luetchford referred to it. The case does not show that the commission, or that the action of any member was affected by it; in fact, the contrary appears."

And supposing it was true that the estimates of the jurors were changed in some individual instances with a view to arriving at an aggregate equal to one-half of the damages found, yet, there is nothing to show that those changes in the direction of increasing the particular assessments of benefits; and the information is perfectly consistent with the idea that the changes referred to effected a

diminution of those particular assessments instead of increasing them.

If the fact that some or all of the jurors empaneled in any ordinary case had varied in opinion during their consultation as to how they should find their verdict, or as to its amount, were to be accepted as invalidating their final deliverance to the court, very few verdicts would be allowed to stand. That some unexplained cyphering was dicovered upon the back of some papers that had been before the jury was something, probably, that quite frequently might appear and in many cases, where the jurors instead of leaping at the result, have deliberated of their verdict, as would be their duty. What the jury in this cause swore was that their verdict was rendered, " without favor or partiality, and to the best of their judgment," and their oath was not made as to the meaning of the casual cyphering referred to.

The complaint that the Attorney of the District claimed in his address to the jury that they should return an amount as *benefits* equal, at least, to one-half the sum of the award of damages, as pointed out in the Act, furnishes no just ground for impeaching the verdict. Whether it would have been better had the remarks alluded to been omitted it is not necessary to decide, as it was admitted by the Attorney at the time in reply to a question by a juror that he was not speaking for the Commissioners of the District, and the jurors were no more bound to abide by his opinion on that point than by the various remarks that must have been made by the numerous attorneys who appeared for the land holders.

Only a few of the exceptions present any new point. The greater majority consist of the usual objections that the allowances of damages for land taken are too low ; and that the assessments for benefits are too high. These objections are frequently made, with an apparent inconsistency, by the same land owner. An instance of that is shown in the exceptions of Louis Ballioux, who swears with respect to his land that the assessment for benefits " is grossly exorbitant

and the amount awarded for damages is grossly inadequate, which, if true, would seem to impute to the jury a remarkable amount of ignorance and lack of judgment, or of moral or mental perversity."

One of the forms of exception more out of the usual track appears in the objection filed by Lydia A. Tanner to the assessment of lot 102 for benefits in the present proceeding (No. 577), on the ground that part of the same lot will, in another proceeding (No. 580), be comprehended within the lines of another projected street. But this has been held by the courts to constitute no valid objection to the condemnation for benefits in another case—as has been decided in this Court in this class of proceedings. See also 113 Pa. State, 536, Michaner *vs.* City of Phila., as follows:

"The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer, or his property. Laid as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confer no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and diminished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be improbable if in every instance of special taxation the question of benefits could be thrown into the jury box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better to endure the ills we have than fly to those we know not of."

It would, of course, be impossible for me to discuss *seriatim* each of these exceptions. I have examined them all by the light of whatever appears in the case that can be properly

called evidence. Whether it would have been wiser to have required a record to be presented of the evidence adduced before the jury is a matter for the legislature to decide. Such a record, to be of any value, should, of course, omit nothing; for something important testified to with respect to one of the undisputed awards might necessarily be applicable by the jury to every other case, and no part of it could be justly omitted if the appellate court should have a full understanding of what occurred; and it would be a difficult thing to transfer to paper the precise effect their view of the land had upon the jury, as it would only be formulated in the conversation and discussion by the jurors themselves. Suffice it to say, the statute makes no such requirement; and there was no such record made. And the partial, *ex parte*, affidavit placed in the papers by particular excepting land owners must present to the Court a very meager view of what actually was testified to before the jury, or of what was imbibed by them from their own observation of all the parcels and improvements.

I can only take time to notice with any particularity a few of the exceptions of this class most particularly insisted.

The protests of Mrs. Breckinridge, of the company of Rider, Wolcott, Sanders, W. W. Brown, and some others, are based upon the idea that it is unjust to confine the assessment of benefits to the lots immediately abutting on the Columbia road, but that they should apply to all property from which it adds a convenient access to the city.

On the other hand, Mr. Cousar and Heinz, and others protest against *their* lots being charged with any benefits, because they are so *remote* from Columbia road, and do not abut upon it.

These objections seem to answer each other.

Westmoreland, Dr. Davis, and others except to the low valuation of their lands, because, they allege, they paid for them at a higher rate when they became the owners. But

even if their statements to this effect are correct, they would only be a few of a large number of persons who have made unwise purchases, and neither their error of judgment nor the fall of prices in the particular locality can prevail against the sworn judgment of intelligent and conscientious jurors swearing to their belief of the present value of the lots.

According to others of the exceptions, the jury erred or acted improperly in almost every possible respect, including the particulars relied upon in the opinion of the Court of Appeals, before referred to. Others base their objections upon the fact that the street and road have not yet been widened and that the property of the lot owners should not be assessed until the benefit has been actually *earned* by the opening of the street.

The argument of counsel for Mr. Clapp and several others of the exceptors presented their grievances in an able and exhaustive manner. But I find myself unable to arrive at the conclusion that the sums reported for values or benefits are manifestly wrong or unjust, and that the complaints of interested parties under the circumstances appearing in the record should be allowed to prevail against the award of the seven intelligent and impartial jurors who carefully examined the lands for themselves besides listening to all the testimony brought before them by all the land holders and the District authorities.

After looking at the papers there is a good deal to be said about that. It seems to me that the better reason for holding to the reported valuation of the land is that nobody could use it for any but one purpose, and that is as building lots. How would you get to them? There must be some way. Of course, the land is laid out into building lots. Ultimately, if the owner should want to have a street cut through there, he would have to give up his land with no compensation. He has no sewerage, no light, no water—has not anything at all. Is it not beneficial to have the road at

the side of this land improved? Would not that tend to develop the value of the land lying remote thereto, which land would not be fit for any use whatever except what I have stated?

I therefore overrule all these exceptions I have been considering, except that of Mr. Deering, which I must regard as an error in recording the valuation agreed upon as $50 instead of $100.